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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72–1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

*Petitioner,*

vs.

ABRAN RAMIREZ, LARRY GILL AND ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA,

*Respondents.*

## On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT EDMUND G. BROWN JR., SECRETARY OF STATE OF CALIFORNIA

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**On Writ of Certiorari to the Supreme Court of the State of California**

BRIEF FOR RESPONDENT EDMUND G. BROWN JR., SECRETARY OF STATE OF CALIFORNIA

## QUESTION PRESENTED

Whether an otherwise eligible elector who in the past was convicted of a felony for which he has completely served his term of imprisonment and parole may, consistent with the Fourteenth Amendment, be denied his right to vote on the basis of a determination by a local election official that the crime for which he was convicted was "infamous."

## STATEMENT OF THE CASE

Since 1849 the California Constitution has contained a provision denying the right to vote to persons who had been convicted of "infamous crimes." Until 1966, the term "infamous crime" was generally interpreted by election officials and the lower courts in California to include all felonies. In 1966, however, the California Supreme Court in *Otsuka v. Hite*, 64 Cal.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284, ruled that the voting prohibition was applicable only to felonies "involving moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process." 64 Cal.2d at 599.

Following the *Otsuka* decision it became the responsibility of local officials in each of the 58 California counties to determine which former felons would be permitted to vote. The result was that the right to vote of an ex-felon in California was usually determined solely by the county in which he happened to reside. A report prepared by the Secretary of State's office on May 30, 1972, following a survey of the county election offices concluded that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others." (Record, Exhibit I to Petition for Writ of Mandate, at 2.)

Shortly after the issuance of the Secretary of State's report, three former felons who had been denied the right to vote and four organizations petitioned for a writ of mandate from the California Supreme Court,

seeking a ruling that the ex-felon voting disqualification as applied to persons who had completely served their terms of imprisonment and parole was a denial of equal protection of the laws. Named as respondents were Secretary of State Edmund G. Brown Jr., the chief elections officer of California, and the clerks of the three counties in which the individual petitioners resided, as representatives of the class of county election officials. The Secretary of State, represented by the California Attorney General, urged the State Supreme Court to exercise its original jurisdiction and issue an alternative writ of mandate (analogous, in California procedure, to an order to show cause) so that the confusion resulting from *Otsuka* could be resolved and voter eligibility made uniform throughout the State. The alternative writ was issued, and the three named county clerks advised the court that rather than contest the issue they would register all ex-felons who were otherwise eligible. On the other hand, the clerk of Mendocino County intervened as a party respondent and urged the court to deny the petition.

On March 30, 1973, the California Supreme Court unanimously issued its ruling that the ex-felon disqualification was unconstitutional. *Ramirez v. Brown.*, 9 Cal.3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137. On May 26, 1973, the clerk of Mendocino County filed a Petition for Writ of Certiorari in this Court. She was not joined in seeking review of the California Supreme Court decision by any of the four original

respondents in the proceeding below. This Court granted Certiorari on October 9, 1973.

The California Secretary of State was not mentioned in the caption in the Petition for Writ of Certiorari, but since he was a party to the proceeding below he is automatically a party respondent in the present proceeding by operation of Rule 21 of the Rules of this Court. On July 24, 1973, the Secretary of State notified the Court of his intention to participate in this proceeding as a party respondent.

## SUMMARY OF ARGUMENT

1. Prior to the decision of the court below, there was a complete lack of uniformity between California counties with regard to disenfranchisement of ex-felons. Virtually any former felon would be permitted to vote in some California counties and barred from voting in others. In practice, the ex-felon voter disqualification was a geographic discrimination without semblance of rhyme or reason. The California disenfranchisement of former felons, as interpreted by the California Supreme Court and as administered by county election officials was utterly indefensible, without regard to whether a uniform disenfranchisement of former felons would be constitutionally permissible.

2. Section 2 of the Fourteenth Amendment does not create an exception to the Equal Protection Clause. It does not purport to do so by its own terms. Section 2 cannot be read as creating an implied exception permitting the states to disenfranchise former felons in violation of the Equal Protection Clause un-

less it is also read as authorizing the state to disenfranchise on the basis of race. Such an interpretation would be absurd in light of numerous decisions of this Court. Although Section 2 does suggest that the authors of the Fourteenth Amendment did not object to disenfranchising former felons, changing notions of equal protection as well as changes in the manner of conducting elections have made the disenfranchisement impermissible, particularly when administered discriminatorily, as in California.

## ARGUMENT

### 1. The county-by-county disenfranchisement of ex-felons is unconstitutional because a person's voting qualifications are unrelated to the county in which he resides.

On its face, the ex-felon voter disqualification in the California Constitution appears to set forth a single rule governing the entire state. Cal. Const. art. 2, § 3. It is well-established, however, that:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.
>
> *Yick Wo v. Hopkins,* 118 U.S. 356, 373–74 (1886).

Although California county election officials do not disqualify voters with an "evil eye," the practical effects of the disenfranchisement of ex-felons has

proved to be as arbitrary and unfair as the practices which were condemned in *Yick Wo v. Hopkins, supra.*

In *Otsuka v. Hite,* 64 Cal. 2d 596, 414 P. 2d 412, 51 Cal. Rptr. 284 (1966), the California Supreme Court ruled that not all ex-felons are disenfranchised in California, but only those whose crimes involved moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process.

64 Cal. 2d at 599.

The California court ruled that a conviction for refusing to report for induction under the Selective Service and Training Act of 1940 did not constitute an "infamous crime" causing disenfranchisement. Otherwise, the court left it up to the county clerks and registrars of voters to determine which felonies were "infamous" under the new standard.

The result of the *Otsuka* decision was a complete lack of uniformity in application of the ex-felon disqualification from one county to another. The Secretary of State reported in 1972, following a survey of the counties, that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others." *Report of Secretary of State Regarding the Right to Vote of Ex-Felons in California,* May 30, 1972, at 2 (Record, Exhibit I to Petition for Writ of Mandate). The report also indicated that "in those counties where records were kept which made estimates possible, the figures ranged from 100% of those

who applied having been permitted to vote, to 100% of those who applied having been denied the vote." *Id.* at 4. As specific examples of inequities arising from lack of a uniform statewide practice, the report cited the following:

a. The crime of murder disqualifies a person from voting in at least four counties, but does not disqualify in at least six counties. In one additional county, first degree murder disqualifies, but not second degree murder.
b. Sale of drugs disqualifies an applicant in at least five counties, but not in at least nine counties.
c. Persons convicted of robbery have been permitted to vote in at least eight counties, but not in at least seven counties.
d. A person convicted of a felony under the Election Code would probably be denied the right to vote in every county.
e. A person convicted of refusal of induction into the armed forces would apparently be permitted the right to vote in each county.
f. As to every other felony, however, it appears that some counties might deny the right to vote while other counties would grant it.

*Id.* at 5

The California Supreme Court was manifestly correct in striking down a voter disqualification which has been imposed so arbitrarily and so inconsistently. The state has no rational basis for disenfranchising an auto thief in Los Angeles while it permits a murderer to vote in San Francisco. No conceivable state

interest, compelling or otherwise, is furthered by granting the right to vote to a rapist in Santa Clara County but then taking it away if he happens to move across the county line into San Mateo. See Appendix, pp. 33–40. Even if a uniform disenfranchisement of some or all felons could be upheld, the California provision, as authoritatively construed in *Otsuka,* has been so discriminatorily implemented as to be utterly indefensible.

Far from furthering any legitimate state interest, the post-*Otsuka* ex-felon disqualification has added to the administrative burden of election officials and interfered with the accomplishment of objectives which have been explicitly enunciated by the Legislature. Calif. Elections Code § 201 provides in part:

> It is ... the intent of the Legislature that county clerks, in order to promote and encourage voter registrations, shall enlist the support and cooperation of interested citizens and organizations, and shall deputize as registrars qualified citizens in such a way as to cover most effectively every section of the county. The persons so deputized shall be permitted to register voters anywhere within the county, and the county clerk shall not deny deputy registrars the right to register voters anywhere in the county.

Pursuant to this section, most major voter registration drives in California are conducted by private citizens who volunteer to serve without pay or with nominal pay on a part-time basis. Such volunteers were unable to implement complex guidelines adopted

under *Otsuka*. Accordingly, deputy registrars were usually instructed to refuse to register *any* ex-felons, but to refer them to the county clerk or county counsel. Such a practice not only created extra work for the county officials who had to decide such cases, but it also hindered the legislative policy declared in Section 201 of promoting and encouraging voter registrations by permitting deputy registrars to register voters anywhere in the county.

It is apparent from the foregoing that the Court below correctly determined that California was violating the Equal Protection Clause in its disenfranchisement of ex-felons. If this Court were to reverse the decision of the California Supreme Court, election officials would be forced to return to the same state of confusion as before, for *Otsuka* would be restored as the authoritative construction of the disenfranchisement provision by the state's highest tribunal. Accordingly, even if this Court believes that a consistent and uniform disenfranchisement of former felons may be constitutionally permissible, the decision of the California Supreme Court in the present case should be affirmed.

### 2. Section 2 of the Fourteenth Amendment does not, by its Own Terms or Under the Decisions of This Court, Justify Denial of Equal Protection of the Laws in the Present Case.

Notwithstanding the manifest inequity of the California ex-felon disqualification as it is applied, and its utter unrelatedness to any state interest, the Men-

docino county clerk asserts that the decision of the California Supreme Court should be overruled because Section 2 of the Fourteenth Amendment specifically authorizes the disqualification. This assertion, which was not advanced in the court below, has been accepted by some courts in recent years, *e.g., Green v. Bd. of Elections of New York City,* 380 F. 2d 445, 452 (2d Cir. 1967); *Beacham v. Braterman,* 300 F. Supp. 182 (S.D. Fla. 1969), aff'd mem., 396 U.S. 12 (1969), but it has no support in the language of the Fourteenth Amendment and it is in fact inconsistent with numerous decisions of this Court.

Section 2 of the Fourteenth Amendment,[1] does not, by its terms, permit a State to do anything prohibited by Section 1. Section 2 is not set forth as an exception to Section 1, nor does it even make any reference to Section 1. Indeed, Section 2 does not purport to either permit or prohibit any action by a State, but merely provides for apportionment of Representatives among the States. It is asserted, however, that Section 2 impliedly creates an exception to Section 1, because the

[1] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for particiaption in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

framers of the Fourteenth Amendment would not have set up an apportionment formula in Section 2 based on a voter disqualification that was prohibited by Section 1.

Unfortunately for the Mendocino County Clerk, her argument is too broad. It is true that Section 2 contemplates that states may disqualify ex-felons from voting. But Section 2 also contemplates that states would disqualify citizens from voting on other grounds, including race. If disenfranchisement of Negroes had not been contemplated, there would have been no reason for enacting Section 2. Accordingly, if Section 2 is read as creating an implied exception to Section 1, then the Equal Protection Clause would not prohibit a state from setting up race as a voter qualification. Such a conclusion is, of course, contrary to numerous decisions of this Court. *E.g., Nixon v. Herndon,* 273 U.S. 536 (1927). The foregoing analysis was adopted by a three-judge district court in *Stephens v. Yeomans,* 327 F. Supp. 1182 (D.N.J. 1970).

It is true that under Section 2 a state which disenfranchised on the basis of race would be penalized by losing representation in Congress whereas a state which disenfranchises on the basis of a criminal conviction is exempted from such a penalty. The fact remains, however, that both types of disenfranchisement are contemplated by Section 2, and there is no more basis for reading Section 2 as creating an exception to Section 1 in one case than there is in the

other. The most one can conclude is that the drafters of the Fourteenth Amendment found both types of disenfranchisement tolerable but found racial disenfranchisement somewhat more objectionable than disenfranchisement for a criminal conviction. Since it is clear that Section 2 does not create an exception to Section 1, the fact that it may evidence that in the mid-Nineteenth Century disenfranchisement of ex-felons was a generally accepted practice is not conclusive for present-day interpretation of the Equal Protection Clause:

> the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.
>
> *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 669 (1966).

Aside from changes in judicial notions of "equal treatment" under the Equal Protection Clause, changes in the conduct of elections have removed many of the considerations which may have justified the disenfranchisement of ex-felons. The court below described many of the factors—development of the secret ballot; registration of voters; penal statutes prohibiting buying and selling of votes and other types of election fraud; vastly increased constitu-

encies, making it prohibitively expensive and logistically impossible to buy enough votes to affect an election—which have done away with the necessity to rely on crude measures such as the blanket disenfranchisement of all former felons. *Ramirez v. Brown,* 9 Cal. 3d 199, 212–216, 507 P. 2d 1345, 107 Cal. Rptr. 137 (1973). Even if the ex-felon disqualification was a valid legislative responsive to conditions of the Nineteenth Century, the changes that have occurred over the last century have removed all rational basis for the disqualification. Accordingly, the court below appropriately declared the disqualification provision invalid. *Cf. Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924).

## CONCLUSION

For the reasons set forth above, the considerations surrounding the disenfranchisement provision in question are unique to California, and respondent Brown respectfully submits that the writ of certiorari should be dismissed as improvidently granted. In the alternative, respondent Brown respectfully submits that the judgment and opinion of the California Supreme Court below should be affirmed.

Respectfully submitted,

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*Edmund G. Brown Jr.*
*Secretary of State of the*
*State of California*

Dated, December, 1973

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